IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 87

FRANCES E. LATENDRESSE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Frances E. Latendresse, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 30, 1957.

CITATION TO OPINION BELOW.

The Tax Court of the United States rendered an opinion filed on May 25, 1956. A copy of this opinion is printed in the appendix for petitioner filed in the United States Court of Appeals for the Seventh Circuit, which is attached hereto and incorporated herewith pursuant to rule 21 (3) of the rules of the United States Supreme Court. This opinion is printed in 26 TC 318 (#39).

The opinions of the Seventh Circuit Court of Appeals, a copy of which is contained in the appendix printed herewith (as Exhibit A), is reported at 243 F. 2d 577.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 30, 1957, and a copy is appended to this petition in the appendix as Exhibit A. Petitioner's petition for rehearing was denied on May 25, 1957. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

The sole question is whether section 22(b) (3) or section 126 of the Internal Revenue Code of 1939 applies to the facts as hereinafter set forth in our statement of the case.

STATUTES INVOLVED.

Statutes Primarily Involved.

Section 22(b) (3) of the Internal Revenue Code of 1939 provides:

> "(b) Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:"
>
> "(3) *Gifts, Bequests, Devises, and Inheritances.* The value of property acquired by gift, bequest, devise or inheritance * * *"

Section 126 of the Internal Revenue Code of 1939 *Income in Respect of Decedents.* (This lengthy statute is set forth in full in Exhibit B of the appendix.)

Statutes Secondarily Involved.

These lengthy statutes are set forth in full in Exhibit B of the appendix. Included therein are the following statutes:

Section 22(a)—General definition of gross income.

Section 22(f)—Gain or loss from the disposition of property.

Section 111(a)—Gain from the disposition of property is the excess of receipts over basis as determined pursuant to Section 113.

Section 113—Basis is either (a) cost or (a) (5) fair market value of the property at date of inheritance.

STATEMENT OF CASE.

The Tax Court and Circuit Court found that the decedent had purchased contingent accounts receivable and had purchased a right to do business, which at death left more contingent accounts receivable. The courts also found that these contingent accounts receivable had not been paid nor resold at date of death. The decedent died July 3, 1944 and his widow, the petitioner herein, was held to have inherited these contingent accounts receivable. The discounted value of the contingent accounts receivable at date of death was $124,365.17. The decedent's cost basis as of the date of death was $24,448.75. The widow received partial payment of these accounts, and the Commissioner of Internal Revenue taxed the entire receipts as "items of gross income with respect of a decedent", pursuant to the provisions of section 126 of the Internal Revenue Code of 1939. The taxpayer argued that all receipts by petitioner were exempt from gross income to the extent that the payments did not exceed the fair market value at date of death, pursuant to the provisions of section 22(b) (3) of the Internal Revenue Code of 1939 and *Hartley* v. *Commissioner*,

(1935), 205 U. S. 216, 55 S. Ct. 756, 79 L. Ed. 1399. The Tax Court held and the Circuit Court affirmed that the petitioner should be taxed only to the extent that her receipts exceeded the cost basis of the decedent.

BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE.

Jurisdiction of the Tax Court was invoked pursuant to section 272 of the Internal Revenue Code of 1939 and appeal to the Court of Appeals for the Seventh Circuit was pursuant to section 7842 and 7483 of the Internal Revenue Code of 1954.

REASONS FOR GRANTING THE WRIT.

The decedent purchased contingent accounts receivable which were neither paid nor resold by date of death. Payment was subsequently made to the widow, the petitioner herein. We are trying to compute her gross income.

The Internal Revenue Code of 1939, section 22(b), (3) states that "gross income does not include the value of property acquired by gift, bequest, devise or inheritance". One exception to this rule is section 126 of the Internal Revenue Code of 1939. This section provides: (1) "the amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or prior period * * * shall be included in the gross income, for the taxable year when received", and (3) "shall be treated * * * as if it had been acquired * * * in the transaction in which the right to receive the income was originally acquired * * *" and it "shall be considered * * * to have the character which it would have in the hands of the decedent if the decedent had lived and received such amount."

Thus the question boils down to "shall we compute peti-

tioner's gross income as being the excess of receipts over: (a) the date of death fair-market value pursuant to section 22(b) (3) [and 113(a) (5)]; or, in the alternative, over (b) the decedent's cost basis pursuant to section 126 [and 113(a)]?"

The former, section 22(b) (3), includes all property whether real, personal, intangible, contingent, etc., including "items of gross income". Therefore, if the exception of section 126 is not applicable, this section 22(b) (3) is all inclusive.

The trouble is with the interpretation of the second statute. As this court has been heretofore advised in *Rose J. Linde*, 17 T.C. 584, rev. in part 213 F. 2d 1; Cert. Den. 348 U. S. 871; the interpretation being pursued by the Commissioner of Internal Revenue and supported without legalistic reasoning by the courts, is so broad that "items of gross income in respect of a decedent not properly accounted for in the final returns or prior period", now must be read "potential items of gross income in respect of a decedent, * * *" etc.

To the contrary, a simple reading of the latter statute, section 126, discloses two old friends. The first is the generic concept of taxable income. What, or better, when is income? The second is realized gross income which is not properly accountable for Federal income tax purposes either on the cash or the accrual method of accounting. This latter is known as the "assignment of income" doctrine. The leading case is *Helvering* v. *Eubank* (1940), 311 U. S. 122, 61 S. Ct. 149, 85 L. Ed. 81, where the taxpayer on the cash basis was not allowed to avoid accounting for his gross income merely because he gave away his earned salary before cash payment was made. Otherwise under this doctrine property (such as purchased by Mr. Latendresse) having an enhanced value can be given away with-

out the imposition of income taxes upon the transferor for the unrealized profit.[1]

Thus, the simple reading of this section 126 would seem to require as a condition precedent to its application that there must be in existence during the lifetime of the decedent some items of gross income which has not been accounted for by the decedent under his method of accounting. We are certain that this statute must be so construed. Almost the entire historical background of this section 126 was discussed in or derives from the case of *Helvering* v. *Enright* (1941), 312 U. S. 636; 61 S. Ct. 777, 85 L. Ed. 1093. The whole bone of contention of the *Enright* case (312 U. S. 636) involves what an unfair advantage the cash basis decedent had over the accrual basis decedent since his accrued items of gross income would never have to be reported for income tax purposes as long as he had not actually received the cash during his lifetime. The Supreme Court decided the *Eubank* (311 U. S. 122) and the *Enright* (312 U. S. 636) cases during the same term.

There are no other authoritative aids to the determination of whether section 22(b) (3) or section 126 applies. The newcomer section 126 makes no reference directly or through legislative history to the original concept of section 22(b) (3). Although there are many decisions on the issue, no court discusses the line of demarcation.

Therefore, petitioner argued before the Tax Court and the Court of Appeals that section 126 did not apply because there was no unreported item of gross income of the decedent now owned by petitioner. The purchased receivables were capital transactions which had not been completed or otherwise terminated and, therefore, not "closed" so

1. See *Blair* v. *Commissioner* (1937), 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465. Please note also that petitioner's case follows the *Blair* case and not the *Eubank* case because of the cost basis—money having heretofore been determined to be property.

as to constitute "realized" gross income prior to death of the decedent. Both courts refused to honor or acknowledge petitioner's arguments beyond the statement that they were not understood.

Apparently, of most significance to the Tax Court was petitioner's acknowledgment that if the decedent had lived until discharge of the debtor or until resale of the accounts, then the decedent would have realized income. So, the Court held against petitioner. As we pointed out on appeal, under such reasoning every single piece of property inherited from a decedent containing appreciated value would now be denied the exemption of section 22(b) (3). This would include the crops inherited from the farmer, the inventory of the real estate dealer decedent, and so would one have to use the decedent's basis in determining profit from the discharge of bond obligations purchased for less than face value. Respondent in oral argument agreed and so argued.

We simply do not believe that Congress intended to make such inroads into section 22 (b) (3), or to repeal the law of *Hartley* v. *Commissioner*, *supra*, (1935), 295 U. S. 216, 55 S. Ct. 756, 79 L. Ed. 1399, which held that when a capital transaction is closed, gross income is computed by subtracting the fair market value at date of inheritance from the gross proceeds. One did not use the decedent's cost basis.

Certainly the Treasury said nothing about any such interpretation when it requested Congress to repeal section 22 (b) (3) in 1942. See *Hearings, Ways and Means Committee, 77th Congress, 2nd Session Revenue Revision of 1942*, p. 89, 90. The Treasury's request was refused by the reenactment of the section, without change, a fact which was also true of the findings in the *Hartley* case (295 U. S. 216).

True, there is some ambiguity in the statute. Congress said "gross income in respect of a decedent", not "gross income of a decedent", but this is easily explained in the *Hartley* case (295 U. S. 216) that when a person dies, he is no longer a person in being subject to imposition and assessment of Federal income taxes. Yet, what else could there possibly be for the lower courts to conjure the holding of the *Hartley* case (295 U. S. 216, 219).

> "No plausible reason has been advanced for supposing that Congress intended * * * to bring gains or losses accruing between the date of decedent's acquisition of the property and his death, into the computation of both the estate tax and the income tax assessed upon his administrator or executor."

It seems at least peculiar that Congress, if it favored the Commissioner's viewpoint, would reenact old section 22 (b) (3) as in the *Hartley* case (295 U. S. 216) then create a new concept in the form of section 126 without mention of the interrelation between the two sections.

In the present *Latendresse* case the net effect of the Tax Court decision affirmed by the Court of Appeals was to require petitioner to use the decedent's cost basis of approximately $24,448.75 instead of the date of death value of approximately $124,365.17 to compute her gross income. This is directly contrary to the *Hartley* holding (295 U. S. 216).

Even though petitioner will not have her day in court unless certiorari is granted, we realize that a mere poor decision in one case is not ordinarily sufficient grounds for granting certiorari. Yet, the taxpayer has one further point. The breakdown of judicial process here seems to be universally true. Of the 14 cases decided under section 126, not one discusses the assignment of income doctrine, cites section 22 (b) (3) or its equivalent, or discusses any possible distinction between a section 126 asset and any

other type of asset. Furthermore, as set forth by Frank G. Scott in *The Strange Case of Commissioner vs. Linde*, 33 Taxes Magazine, September, 1955, page 675, there are more law journal articles than cases on the subject. Many articles have been written since. Almost every one seems to be confused on the subject. The *Linde* case (213 F. 2d 1) is a prime example. A reading of the opinion of the Court of Appeals of the Ninth Circuit shows that it equally did not comprehend the issue as set forth in the *Linde* petition to the Supreme Court for Writ of Certiorari and now paraphrased in the instant *Latendresse* case. In the *Linde* case (213 F. 2d 1), the decedent's grape crop was held to be an "item of gross income in respect of a decedent". True, the crop was subject to a contract to sell, but, as pointed out in the petition for Writ of Certiorari, the transaction was not "closed" within the generic concept of the realization of taxable income. The court held, nevertheless, on page 3

> "it is our judgment that even assuming that sales were not made by decedent during his lifetime, yet the amounts paid to the respondent taxpayer in 1945 pursuant to and in accordance with the agreements with the associations constitute 'income in respect of a decedent' within the meaning of section 126."

The opinion of this case, as in our present case, has a tremendous impact on our society. For instance, every enlightened small business man in the country surely has a buy and sell agreement in his estate plan which proposes to sell his business after his death. How can such a buy and sell situation conceivably be distinguished from the lower court decisions in the *Linde* case (213 F. 2d 1) or this *Latendresse* case now before the court. To tax those buy and sell agreements as "income in respect of a decedent" within section 126 would be catastrophic. Surely Congress did not intend such a result.

This anticipates the third reason why the court should grant this petition for writ of certiorari. Perhaps Congress should be asked to correct the *Linde*, the *Lilienthal* or the buy and sell situation as expounded by the courts below. But, if we go to Congress, should we ask them to reenact section 22 (b) (3) which is already the Internal Revenue Code so that we may determine our gross income as set forth in the *Hartley* case (295 U. S. 216); or should we ask Congress to revoke section 126 and so reopen the issue of the *Enright* (312 U. S. 636) and *Eubank* (311 U. S. 122) cases which have nothing to do with the generic concept of taxable income, but only the reporting thereof. We conclude that our better course of action is to ask the Supreme Court if, for purposes of section 128, it still adheres to its definition that gross income in respect of anybody is only "realized" when a transaction is "closed" as set forth in:

Gray v. *Darling* (1872) 82 U. S. (15 Wall.) 63, 21 L. Ed. 45;

Lynch v. *Turrish* (1918) 274 U. S. 221, 38 S. Ct. 189, 239 L. Ed. 1087;

Merchants Loan and Trust Co. v. *Smietanka* (1921), 255 U. S. 509, 41 S. Ct. 386, 65 L. Ed. 751,

and others.

On the other hand, if a new concept is to be created, petitioner respectfully requests the privilege of participating therein, instead of allowing the decision herein to rest upon the incomprehensibility of counsel.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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EXHIBIT A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11902 September, 1956 Term—April, 1957 Session

Frances E. Latendresse, *Petitioner.* vs. Commissioner of Internal Revenue, *Respondent.*	On Petition for Review of the Decision of the Tax Court of the United States

April 30, 1957.

Before DUFFY, *Chief Judge*, and FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Chief Judge.* The Commissioner determined deficiencies in income tax against the taxpayer claiming she had failed to include in her gross income for the years 1946 to 1949, inclusive, renewal commissions which were paid to her in those years by the Standard Life Insurance Company of Indiana. The Tax Court approved the Commissioner's determination except it allowed certain deductions for amortization.

The principal question here for decision is whether insurance renewal commissions received by the taxpayer in the years 1946 through 1949 should be included in her gross income for those years as income in respect of her

deceased husband within the meaning of § 126 (a) (1), (3) Internal Revenue Code of 1939. If that question be decided in the affirmative, there arise three additional questions: 1) whether taxpayer is entitled to a deduction for amortization of the costs of certain contracts; 2) whether the portion of commissions retained by the Insurance Company against advances for expenses are to be included in taxpayer's gross income for 1946, and 3) whether the collection of deficiencies for the years 1946 and 1947 are barred by limitations under § 275(c) Internal Revenue Code of 1939.

Taxpayer is the widow and sole beneficiary under the will of Frank J. Latendresse who died July 3, 1944. Until 1941 when decedent moved to Indianapolis, he lived in Marion, Indiana, where he and his wife were partners in the S & L Gravel Company. Decedent became connected with the insurance business of Standard through several contracts hereinafter described.

Standard was organized in 1934 by Arthur H. Wyatt and George F. Flagg for the purpose of carrying on a life insurance business. Wyatt was designated as Standard's General Agent for the sale of certain capital stock of the company and life insurance policies denominated "organization policies" in an aggregate amount of $15,000,000. Wyatt employed Flagg to assist him in the performance of these contracts. Under date of February 28, 1939 Wyatt entered into a contract with Frank J. Latendresse hereinafter sometimes called Frank, and the contract is hereinafter referred to as the "A Agency Contract." Wyatt sold Frank the unperformed part of the former's contract with Standard. The consideration to Wyatt was $23,000 of which $3,000 was contributed by Flagg, and $3,860.34 was assigned as the purchase price of the tangible assets. This sale did not include the deferred or contingent renewal commissions on insurance and stock already sold.

Frank was substituted for Wyatt as the general agent of Standard to sell the remainder of the $15,000,000 of life insurance.

On April 22, 1940, Frank and Wyatt made another contract which is referred to as the A Agency Renewal Contract. The Tax Court found that under this contract Frank purchased from Wyatt for a total consideration of $12,500 the latter's interest in the contingent renewal commissions retained by Wyatt in 1939 in excess of the amounts necessary to satisfy the several obligations for which these contingent sums had been impressed with a trust pursuant to the A Agency Contract.

On April 19, 1939 Standard entered into a contract with Frank's brother, James. This contract is referred to as the B Agency Contract. Under this contract James was appointed general agent for the sale of additional capital stock and of certain insurance policies denominated "Special Coupon Policies," to begin upon the completion of the then-existing contract between Standard and Frank. This agreement was amended on May 31, 1939 to provide for the substitution of Frank as general agent in the event of the death of James. Frank agreed to advance up to $30,000 for the purpose of financing the sale of the new policies, in consideration of which he was to receive 24% of the net proceeds of such business in addition to repayment of the amounts advanced. Flagg was employed to assist in the sale of these policies for which he was to receive 32% of the net proceeds of the business, and was named as successor to the general agency upon the death of both James and Frank. James died on May 11, 1940 and Frank was then substituted as general agent. On December 31, 1941 Flagg sold his interest in the B Agency Contract to Frank for $7,400.43. Frank was the sole owner of that contract at the time of his death and no portion of the commissions belonged either to Flagg or to the estate of James.

On May 29, 1941 Frank entered into a new contract with Standard which is referred to as the C Agency Contract. Under this contract Frank was to act as its general agent in the sale of certain life insurance policies known as "Profit-sharing Participating Thirty-Payment Life" policies. He was to receive as consideration for the sale of the insurance policies 85% of the first year's premiums, 12½% of the premiums for the next five years, 7½% of the premiums for the next four years, and 5% of the premiums for the next five years plus certain bonuses payable out of the first annual premiums. Each party was to advance funds equal to those furnished by the other up to $20,000 to finance the operation of the general agency during the first year.

Standard had advanced $10,235 up to the date of Frank's death. That amount was carried as a liability of the general agency and was so treated on the estate tax return of Frank. Standard credited $7,441.77 during the year 1946 upon renewal commissions due taxpayer in repayment of its advances.

Frank entered into an agreement with John M. Brown on May 20, 1941 whereby Brown was employed for the purpose of assisting in the carrying out of the C Agency Contract. Brown was to receive 50% of the net profits as compensation. The agreement further provided for the succession by Brown to the general agency upon the death of Frank. Brown was to pay Frank's widow, the taxpayer here, 50% of the net profits less one-half of the bookkeeping and disbursement expenses for all insurance sold up to the date of succession. Brown succeeded to this general agency on July 3, 1944.

The duties of Frank as general agent for the C Agency were "The General Agent shall procure agents to enter into contracts with the Company, shall solicit applications for insurance and annuities with the Company either per-

sonally or through agents procured by him, shall collect in exchange for official receipts furnished by the Company, and remit immediately to the Company, first-year and renewal premiums on business written by or through his agency or transferred to it by the Company with his consent."

Each of the agency contracts provided that upon the happening of certain events (which were not susceptible of ascertainment) the contract could be canceled and Standard could revoke the privilege therein granted.

One hundred agents formerly employed by Wyatt and Flagg were turned over to Frank when he entered the insurance business. All agents engaged in selling the life insurance policies were to be employed by and under the exclusive supervision of Frank.

The Tax Court found that Frank was serving as general agent for Standard at the time of his death, and had the right to receive renewal insurance commissions earned but not then due and payable for insurance written by him subsequent to February 28, 1939 under the A, B and C Agency Contracts. He also had the right to receive certain renewal commissions (in excess of certain obligations) on insurance written prior to February 28, 1939 by Wyatt pursuant to the July 19, 1934 contract. The Tax Court held that such commissions not being includable in the taxable period in which fell the decedent's death, should be treated as ordinary income when received in later years by the taxpayer and that she should be taxed thereon under § 126(a) of the Code of 1939.

Like the Tax Court, we have some difficulty in understanding taxpayer's position. She says the commissions paid to her were attributable to a "continuing capital investment"; that the insurance agency of Frank J. Latendresse was a purchased capital asset which was sold subsequent to his death to John M. Brown, and the sale

need not be accounted for under § 126, Internal Revenue Code, 1939. Taxpayer's position seems to be that the amounts she received were paid as consideration for the sale of a capital asset which she inherited from her husband, and that such amounts are not taxable because she has not yet received the amount of the basis allowed her under § 113(a)(5), Internal Revenue Code, 1939 which provides: "If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

We think the decision of the Tax Court was correct. What the taxpayer received was the right to income, *i.e.*, renewal commissions which her deceased husband had earned while acting as agent for Standard but which were not due and payable at the time of his death. It follows these commissions are income with respect of a decedent under § 126, and that section, in sub-paragraph (a)(3) requires that we treat such income in the hands of the taxpayer who acquired it both by inheritance and designation in the contract of May 20, 1941, as if it had been acquired by her in the transaction by which the decedent acquired such rights.

We now reach the three additional issues hereinbefore stated. The first concerns advances which were made by Standard to the Agency and which were paid in 1946 when Standard retained a sufficient amount of renewal commissions then due to taxpayer in order to pay off its advances. This action by Standard was taken pursuant to a provision in the Agency Contract. At the date of Frank's death, there still were unpaid advances made by Standard. The amount owing in 1946 was $7,441.77 and in order to secure repayment, Standard retained that amount from the renewal commissions then due to taxpayer. We think the Tax Court was correct in agreeing

with the Commissioner's determination that the amount of commissions retained by Standard was part of taxpayer's gross income for 1946. Inasmuch as taxpayer's husband agreed that advances made by standard to his business could be paid out of renewal commissions payable to him, and as such commissions were used to pay off the advances, the commissions must be treated as income in respect of the decedent and taxable to the taxpayer who received her rights to the commissions from her husband.

The next issue is whether the Tax Court correctly determined and computed the amount of deductible amortization. This requires consideration only of the contracts under which Frank purchased his right to be general agent or purchased rights to renewal commissions. Each of said contracts appears to have yielded income in the years following Frank's death. The Tax Court held the costs of such contracts can properly be recovered out of income when such income is to be paid for limited periods which are ascertainable. The Tax Court stated the taxpayer failed to establish facts which would permit the computation of a mathematically accurate allowance for each of the tax years. However, the Tax Court thought it would be unfair to disallow amortization entirely, and under the authority of such cases as *Pleason* v. *Commissioner*, 7 Cir., 226 F. 2d 732, and *Bodoglau* v. *Commissioner*, 7 Cir., 230 F. 2d 336, the Court made its own computation fixing the amount allowable for the four years at $8,500.00. Taxpayer now claims she should have been allowed $10,216.25. We approve of the computation and the allowance made by the Tax Court.

The last issue is whether the five year or the three year statute of limitations is applicable. Taxpayer entered into an agreement with the Commissioner on June 15, 1951 whereby the period for assessing taxes due for 1946

and 1947 was extended to June 30, 1952. The statutory notice of deficiency was mailed November 30, 1951. But taxpayer claims the correct period was three years from the date of filing the returns, and that such period had already expired before the agreement was made with the Commissioner. The Tax Court disagreed and held the facts here bring this case within § 275(c) Internal Revenue Code of 1939.

Section 275(c) provides that if a taxpayer omits from gross income an amount properly includible which is in excess of 25 per centum, the tax may be assessed at any time within five years after the return is filed. Taxpayer reported $8,473.70 and $10,138.81 for the years 1946 and 1947 respectively, and omitted renewal commissions in the amount of $24,581.38 and $17,887.38 respectively. The commissions omitted were more than 25 percent of the gross income reported. We agree with the Tax Court that the five year statute was applicable.

Judgment

AFFIRMED.

EXHIBIT B.

SEC. 126. INCOME IN RESPECT OF DECEDENTS.

(a) INCLUSION IN GROSS INCOME.

(1) *General Rule.*—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

(B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or

(C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

(2) *Income in Case of Sale, Etc.*—If a right, described in paragraph (1), to receive an amount is transferred by the estate of the decedent or a person who receives such right by reason of the death of the decedent or by bequest, devise or inheritance from the decedent, there shall be included in the gross income of the estate or such person, as the case may be, for the taxable period in which the transfer occurs, the fair market value of such right at the time of such transfer plus the amount by which any consideration for the transfer exceeds such fair market value. For the purposes of this paragraph, the term "transfer" includes sale, exchange, or other disposition, but does not include a transfer to a person pursuant to the right of such person to receive such amount by reason of the death of

the decedent or by bequest, devise, or inheritance from the decedent.

(3) *Character of Income Determined by Reference to Decedent.*—The right, described in paragraph (1), to receive an amount shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction by which the decedent acquired such right; and the amount includible in gross income under paragraph (1) or (2) shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

(b) *Allowance of Deductions and Credit.*—The amount of any deduction specified in section 23 (a), (b), (c), or (m) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credit), in respect of a decedent which is not properly allowable to the decedent in respect of the taxable period in which falls the date of his death, or a prior period, shall be allowed:

(1) *Expenses, Interest, and Taxes.*—In the case of a deduction specified in section 23(a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,

(A) to the estate of the decedent; except that

(B) if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.

(2) *Depletion.*—In the case of the deduction specified in section 23 (m), to the person described in subsection (a) (1) (A), (B), or (C) who, in the manner described therein, receives the income to which the deduction relates, in the taxable year when such income is received.

(e) *Deduction for Estate Tax.*

(1) *Allowance of Deduction.*—A person who includes an amount in gross income under subsection (a) shall be allowed, for the same taxable year, as a deduction an amount which bears the same ratio to the estate tax attributable to the net value for estate tax purposes of all the items described in subsection (a)(1) as the value for estate tax purposes of the items of gross income or portions thereof in respect of which such person included the amount in gross income (or the amount included in gross income, whichever is lower) bears to the value for estate tax purposes of all the items described in subsection (a)(1).

(2) *Method of Computing Deduction.*—For the purposes of paragraph (1):

(A) The term "estate tax" means the tax imposed upon the estate of the decedent under section 810 or 860, reduced by the credits against such tax, plus the tax imposed upon the estate of the decedent under section 935, reduced by the credits against such tax.

(B) The net value for estate tax purposes of all the items described in subsection (a)(1) shall be the excess of the value for estate tax purposes of all the items described in subsection (a)(1) over the deductions from the gross estate in respect of claims which represent the deductions and credit described in subsection (b).

(C) The estate tax attributable to such net value shall be an amount equal to the excess of the estate tax over the estate tax computed without including in the gross estate such net value.

SEC. 22. GROSS INCOME.

(Sec. 22(a).)

"(a) *General Definition.*—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

(Sec. 22(f).)

"(f) *Determination of Gain or Loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in section 111."

SEC. 111. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

"(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized."

"(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(Sec. 113 (b).)

"(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), * * *"

(Sec. 113 (a).)

"(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—"

(Sec. 113(a)(5).)

"(5) *Property Transmitted at Death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 277

FRANCES E. LATENDRESSE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

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REPLY BRIEF.

We think the respondent's arguments to be either misleading or at least confused and confusing. He cites two cases principally. One is *Helvering* v. *Enright*, 312 U. S. 636, and the other is *Cotlow* v. *Commissioner*, 228 F. 2d 186 (C. A. 2d). We find no earthly reason for the gratuitous interjection of this latter case by the lower courts and by respondent. This case stands for the principle that the disposition of an asset other than by sale or exchange prevents the use of the fifty per cent (50%) deduction for a long term capital gain in determining net taxable income (and presumably the alternate tax). Petitioner never did claim a long term capital gains deduction on the basis of the facts found here by the courts below. This case com-

pletely begs the issue before the Court. The sole issue before the courts is whether in determining gain to petitioner she may subtract the decedent's cost basis or whether she uses the fair market value determined as of the date of death of her decedent husband. The *Cotlow* case in no way mentions section 126, or the basis statutes, and does not deny to Mr. Cotlow the right to sell or exchange the assets involved to make use of the long term capital gains deduction. In fact we think this case involves an asset which is typically the subject matter of section 22(b)(3) which exempts the difference between the decedent's cost basis and the fair market value at date of death.

The case of *Helvering v. Enright, supra* (312 U. S. 636), is used in a manner equally misdirecting although it is closer to the point. The *Enright* case is probably the sole source of section 126. Certainly the lower courts tried mightily to squeeze the facts of this *Latendresse* case into the framework of the *Enright* case. And we might agree with respondent that our case is controlled by the *Enright* case except for one slight detail—the cost basis. It would seem rather late in the history of tax law to have to explain that under the Internal Revenue Code the tax law as developed within the framework of the Constitution divides gross income into two major types. The one is derived from earnings and the other is derived from capital transactions. The essential difference is that the acquisition of an asset by earnings is a taxable transaction. The acquisition of an asset in a capital transaction is not a taxable event—any gain is only recognized when the transaction is closed. The *Enright* case gives a fine coverage of the variations of earnings to be included as gross income in respect of a decedent within the meaning of section 126. Unfortunately for respondent (and probably ourselves) the Supreme Court in the *Enright* case spe-

cifically eliminated capital transactions from its consideration in footnote 23, page 645. The existence of the cost basis marks this *Latendresse* case as involving a capital transaction.

Now we are quite certain that a cash basis decedent may bring a capital transaction gain within the spirit of section 126 by simply dying between the closing date and the cash payment date. But, let us face the issue now before the Court. Here the lower courts found no closing during the lifetime of the decedent. This Court must now decide if it is to stand by its old definition of gain from a capital transaction or whether some new unrecognized definition has been created by the enactment of section 126. As we have pointed out in principal brief, the Commissioner of Internal Revenue has succeeded in both this *Latendresse* case and in *Commissioner v. Linde*, 213 F. 2d 1 (C. A. 9th), in eliminating the requirement that a capital transaction must be closed before gain is to be recognized. As we pointed out, the substituted requirements are without substance, merit or foundation.

There is a certain humor here, if one likes humor of a technical nature. The Tax Court must have had an hilarious session trying to decide what to do with the cost basis in terms of the Internal Revenue Code as a technical matter. For instance the hearing Judge who dissented would have brought the facts of the case squarely within the *Enright* case by eliminating the cost basis. His grounds were failure of proof, even though the costs, the values, and the payments were stipulated and stipulated in detail. Further, you will note, the cost basis has two parts, aside from all the money expended in the operation of the business. One part of the decedent's cost basis is outright purchase of his ex-partners' interest in the renewal commissions themselves and secondly, part of the cost basis derives from the purchase of the power to do business in

the first place. If one is tempted to hold death as being the closing of the capital transaction instead of discharge of the obligations or some other disposition such as sale or exchange, then this latter cost basis is technically a capital loss because under the facts as found by the lower courts the decedent's right to do business was terminated by death. The Tax Court did not dare spell this out in detail because the capital loss deduction is not permitted under the terms of section 126. But the Constitution demands that cost basis be eliminated from gross receipts in order to determine gross income, so the Tax Court performed "equity" and lumped the two elements of basis as an offset. This is still not the end of the matter. The Tax Court having determined that the cost basis should be an offset, did so without the citation of statutory authority. The statutory authority is section 113(a) of the Internal Revenue Code of 1939. If the Tax Court had mentioned section 113(a) it would have had to answer petitioner's argument that section 113(a)(5) applies. The easiest way out of this dilemma still appears to us to be that section 22(b)(3) applies to exempt the difference between the decedent's cost basis under section 113(a) and the date of death value of section 113(a)(5) and so eliminates the assets here in consideration from the operation of section 126. Respondent appears to see this and therefore argues for the virtual elimination of section 22(b)(3) and section 113(a)(5) from the Internal Revenue Code. He finds no assistance from case law, legislative history or other sources. He specifically contends that *Hartley v. Commissioner*, 295 U. S. 216, is outmoded and should not be followed.

In conclusion, it seems hardly necessary to warn the Court that the statements of fact are slanted. We believe the prejudicial findings and omissions are all too patent. For instance the lower courts seem to refer to the con-

tracts in question as negotiable property in and as of themselves instead of evidence of the relationship of all the parties involved. As an example of omission all we can say is who in his right mind would suffer all the cost basis investments found here as well as expand all the money called for in these contracts for the operation of this business if he were not doing something more than throwing himself at the mercy of the vagaries of an employee-employer relationship, or even an ordinary agency relationship? Having found the cost basis the lower courts should have spelled out the entire capital transaction. It is now sufficient for our purposes that they found no closing during the decedent's lifetime. But to be charitable to the courts below this is one of those cases where the legal conclusions must be known before we can sort out the pertinent facts from the mass of written papers and documents which were the only evidence left from the decedent's lifetime operations. And, as we set forth in principal brief, this Court is the country's only recourse to the determination of that legal conclusion.

Nothing else in respondent's brief is particularly pertinent or helpful.

Respectfully submitted,

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No. 177

In the Supreme Court of the United States

October Term, 1956

FRANCES E. LATENDRESSE, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 65-84) are reported in 26 T.C. 318. The opinion of the Court of Appeals (Pet. 13-20) is reported in 243 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1957. (Pet. 13, 20.) The taxpayer's petition for rehearing was denied on May 25, 1957. (Pet. 2.) The petition for a writ of certiorari was filed on July 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Under the will of her husband, who died in 1944, the taxpayer acquired her husband's rights to renewal commissions pertaining to insurance policies written by him, and also her husband's rights, acquired by assignment, to renewal commissions pertaining to insurance policies written by others.

The question is whether such renewal insurance commissions received by the taxpayer during the taxable years 1946 through 1949 should be included in her gross income for those years as "income in respect of a decedent", under the provisions of Section 126(a) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * * * *

(3) [As amended by the Revenue Act of 1942, Section 111(a), c. 619, 56 Stat. 798] *Gifts, bequests, devises, and inheritances.*—The value of property acquired by gift, bequest, devise or inheritance.

* * * * * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 126 [As added by the Revenue Act of 1942, Section 134(c), c. 619, 56 Stat. 798]. INCOME IN RESPECT OF DECEDENTS.

(a) *Inclusion in Gross Income.*—

(1) *General rule.*—The amount of all items of gross income in respect of a decedent which

are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

* * * * * * * *

(3) *Character of income determined by reference to decedent.*—The right, described in paragraph (1), to receive an amount shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction by which the decedent acquired such right; and the amount includible in gross income under paragraph (1) or (2) shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

* * * * * * * *

(26 U.S.C. 1952 ed., Sec. 126.)

STATEMENT

The pertinent facts, including by reference (R. 74) the facts (plus exhibits) stipulated by the parties (R. 18-56), were found by the Tax Court (R. 66-73) and adopted by the court below (Pet. 14-17), substantially as follows:

The taxpayer is the widow and sole beneficiary under the will of Frank J. Latendresse (hereafter called the decedent) who died July 3, 1944. The decedent became connected with the insurance business of the Standard Life Insurance Company of Indiana (to be called Standard) through several contracts hereinafter described. (R. 66, 70, 72.)

Standard was organized in 1934 by Arthur H. Wyatt and George F. Flagg for the purpose of carrying on a life insurance business. Wyatt was designated as Standard's general agent for the sale of certain capital stock of the company and life insurance policies denominated "organization policies", in an aggregate amount of $15,000,000. Wyatt employed Flagg to assist him in the performance of these contracts. (R. 66.) Under date of February 28, 1939, Wyatt entered into a contract with the decedent (hereinafter referred to as the A Agency Contract), under which Wyatt sold the decedent the unperformed part of the former's contracts of July 19, 1934, and September 18, 1937, with Standard. (R. 20-23, Exs. 2(f) and 2(g).[1]) The consideration given Wyatt was $23,000, of which $3,000 was contributed by Flagg, and $3,860.34 was assigned as the purchase price of the tangible assets. This sale did not include the deferred or contingent renewal commissions on insurance and stock already sold. These contingent sums were impressed with a trust for the payment of existing obligations of the agency. The decedent was substituted for Wyatt as the general agent of Standard to sell the remainder of the $15,000,000 of life insurance. (R. 66-67.)

On April 22, 1940, the decedent and Wyatt made another contract (referred to as the A Agency Renewal Contract). (R. 20, 40-41; Ex. 5.) The Tax Court found that, under this contract, the decedent purchased from Wyatt for a total consideration of $12,500[2] the latter's interest in the contingent

[1] The commissions and renewal commissions were to be payable to Wyatt for a period of 15 years. (R. 66.)

[2] The consideration cited in the contract was $10,500 but, as the Tax Court stated (R. 67), the parties stipulated the cost to be $12,500 (R. 56).

renewal commissions, retained by Wyatt in 1939, in excess of the amounts necessary to satisfy the several obligations for which these contingent sums had been impressed with a trust pursuant to the A Agency Contract. (R. 67.)

On April 19, 1939, Standard entered into a contract with the decedent's brother, James (referred to as the B Agency Contract). (R. 20, 23-24; Ex. 3.) Under this contract, James was appointed general agent for the sale of additional capital stock and also certain insurance policies denominated "Special Coupon Policies," to begin upon the completion of the then-existing contract between Standard and the decedent. This agreement was amended on May 21, 1939, to provide for the substitution of the decedent as general agent in the event of the death of James. The decedent agreed to advance up to $30,000 for the purpose of financing the sale of the new policies, in consideration of which he was to receive 24 per cent of the net proceeds of such business in addition to repayment of the amounts advanced. Flagg was employed under this contract to assist in the sale of these policies, for which he was to receive 32 per cent of the net proceeds of the business, and was named as successor to the general agency upon the death of both James and the decedent. James died on May 11, 1940, and the decedent was then substituted as general agent. On December 31, 1941, Flagg sold his interest in the B Agency Contract for $7,400.63 to the decedent who was the sole owner of that contract at the time of his death in 1944, and no portion of the commissions belonged either to Flagg or to the estate of James. (R. 67-68.)

On May 20, 1931, the decedent entered into a new contract with Standard (referred to as the "Agency Contract). (R. 21, 24-28; Ex. 6.) Under this new contract the decedent was to act as its general agent in the sale of certain life insurance policies known as "Profit-sharing Participating Thirty-payment Life" policies. He was to receive as consideration for the sale of the insurance policies 85 per cent of the first year's premiums, 12½ per cent of the premiums for the next five years, 7½ per cent of the premiums for the next four years, and 5 per cent of the premiums for the next five years, plus certain bonuses payable out of the first annual premiums. Each party was to advance funds equal to those furnished by the other up to $20,000 each to finance the operations of the general agency during the first year. (R. 68-69.) This contract further provided in pertinent part that the amount of money furnished by Standard was to be secured solely by the renewal commissions payable thereunder to the decedent, except that during the actual operation and performance thereof only 50 per cent of the renewal commissions were to be applied upon the funds furnished by the Company, and the remaining 50 per cent thereof would be payable to the decedent. If performance under the contract should terminate, however, then the whole of such renewal commissions were to be applied against the funds furnished by the Company, but the decedent was not to be personally liable to repay to Standard any of the funds furnished by it. The contract provided further, moreover, that no partnership relationship was created thereby, and that Standard, by furnishing the funds as provided therein, would acquire no interest in the business enterprise to be conducted by the

decedent under the contract, except that it would be entitled to receive repayment of the funds furnished by it out of the renewal commissions, as above stated. (R. 26, 69.)

Standard had advanced $10,235 up to the date of the decedent's death in 1944. That amount was carried as a liability of the general agency and was so treated on the estate tax return of the decedent. Standard credited $7,441.77 during the year 1946 from renewal commissions due the taxpayer in repayment of its advances. (R. 69.)

The decedent entered into an agreement with John N. Brown on May 20, 1941 (R. 21, 42-49; Ex. 6), whereby Brown was employed for the purpose of assisting in the carrying out of the C Agency Contract. Brown was to receive 50 per cent of the net profits as compensation. The agreement further provided for the succession by Brown to the general agency upon the death of the decedent. Brown, in such event, was to pay the decedent's widow, the taxpayer here, 50 per cent of the net profits, less one-half of the bookkeeping and disbursement expenses, for all insurance sold up to the date of succession. Brown succeeded to this general agency upon the decedent's death on July 3, 1944. (R. 69-70.)

The duties of the decedent as general agent for the C Agency, under the supplemental agreement with Standard dated June 5, 1942 (R. 21, 28-38; Ex. 7), were that he was required to procure agents to enter into contracts with Standard, solicit applications for insurance and annuities with the Company either personally or through his agents, collect, in exchange for official receipts furnished by the Company, and remit immediately to it all first-year and renewal premiums

on business written by or through his agency or transferred to it by the Company with his consent (R. 70).

Each of the above-mentioned agency contracts—of which the A and B Agency Contracts contained similar descriptions—provided that upon the happening of certain events (which were not susceptible of ascertainment) the contract could be canceled by either party and Standard could revoke the privilege therein granted. (R. 70.)

One hundred agents, formerly employed by Wyatt and Flagg, were turned over to the decedent when he entered the insurance business. All salesmen and agents engaged in selling life insurance policies were to be employed by and under the exclusive supervision of the decedent. (R. 70.)

On the basis of the foregoing facts, the Tax Court held that the renewal insurance commissions in question received by the taxpayer during the taxable years involved are chargeable to her as ordinary income, within the meaning of Section 126(a)(1) and (3) of the Internal Revenue Code of 1939. (R. 74-78, 80-81.) The court below affirmed. (Pet. 17-20.)

ARGUMENT

The problem presented in this case concerns the application of Section 126 of the Internal Revenue Code of 1939, and is similar to the problem presented in *Commissioner* v. *Linde*, 213 F. 2d 1 (C.A. 9th), certiorari denied, 348 U.S. 871. The decision in the present case is in full accord with the Ninth Circuit's decision. Since the denial of certiorari in that case, there have been no intervening appellate court decisions, nor does there appear to be any other compelling reasons why the problem should now be reviewed by this Court.

In *Helvering* v. *Enright*, 312 U.S. 636, which arose under Section 42 of the Revenue Act of 1934, c. 277, 48 Stat. 680,[3] this Court held that the share of a deceased member of a law firm in the estimated receipts from the unfinished business of the firm, valued as of the date of his death, should be included in computing his income for the period in which fell the date of his death.

The provision of the Revenue Act of 1934 which was involved in the *Enright* case resulted in hardship in some cases where amounts which would have been received over a number of years were returnable in the year of death, thus carrying the income into the higher brackets. To alleviate this hardship, Section 126 of the 1939 Code was added (and Sections 42(a) and 43 were amended) by Section 134(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798, to provide that income accruing to a decedent because of his death was not includible in his final return, but was to be treated as income and reported as income by the one receiving the right to such income. Such treatment was for the express purpose of alleviating a hardship, and at the same time preventing income in respect of decedents from escaping taxation. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 83-88 (1942-2 Cum. Bull. 372, 435-439); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100-105 (1942-2 Cum. Bull. 504, 579-583).

In the present case, the decedent performed services and as a consequence acquired the right to renewal

[3] Section 42 of the Revenue Act of 1934 was enacted because the courts had held under prior law that income accrued by a decedent on the cash basis prior to his death was not income to the estate but a part of the corpus. *See Helvering* v. *Enright*, 312 U.S. 636, 639. Hence, prior to the Revenue Act of 1934 neither the estate nor the decedent paid income tax on such income.

insurance commissions extending over a period of approximately 15 years. When the decedent's widow succeeded to his rights in these renewal commissions, she was required by the express terms of Section 126 (a)(3) of the 1939 Code to treat them as if she had acquired them in the same transaction by which the decedent had acquired such rights. Since the decedent would have been compelled to treat the renewal commissions, had they been received by him, as ordinary income arising from services rendered, it would seem apparent that this is the clearest kind of case falling within the purview of Section 126.

With respect to the renewal commissions which the decedent acquired by assignment, there would have been nothing more for him to do had he lived, but to have received the money. And had he received the payments, they would have been taxed to him as ordinary income. *Cottle* v. *Commissioner*, 228 F. 2d 186 (C.A. 2d). By virtue of the terms of Section 126, the taxpayer stood in the shoes of the decedent when she received these payments, and hence the payments similarly would constitute ordinary income to her.[4] *Estate of Remington* v. *Commissioner*, 9 T.C. 99, taxpayer's appeal dismissed, November 9, 1948 (C.A. 2d); *Commissioner* v. *Linde*, 213 F. 2d 1 (C.A. 9th), certiorari denied, 348 U.S. 871; *O'Daniel's Estate* v. *Commissioner*, 173 F. 2d 966 (C.A. 2d); *Estate of Narischkine* v. *Commissioner*, 14 T.C. 1128, affirmed *per curiam*, 189 F. 2d 257 (C.A. 2d); *Bausch's Estate* v. *Commissioner*, 186 F. 2d 313 (C.A. 2d).

[4] The decedent would have had the right to recover amortization of the consideration he had paid for property, and likewise the taxpayer is entitled to have allowance made for any unrecovered cost. Both courts below have made such allowance (R. 78-80; Pet. 19), and no question is raised in the petition with respect to this allowance.

The taxpayer's chief reliance (Pet. 3, 7) in this Court is upon the decision in *Hartley* v. *Commissioner*, 295 U.S. 216. That case involved the question of the basis for computing gain or loss on the sale of property by the decedent's estate. The decision there was handed down in 1935, seven years prior to the passage of the statute here involved and has, we believe, no bearing whatsoever on the present problem. Section 22 (b)(3) of the 1939 Code, adverted to by the taxpayer (Pet. 4 *et seq.*), would have been applicable only in a situation where the decedent, had he lived, would have been forced to alter the then-existing contractual relationships in order to have himself realized the income. Here, the existing contractual relationships required the payments to be made to the decedent, and nothing further was required of him to close the transactions for the realization of ordinary income. Section 22(b)(3) is a general statute which yields to the specific treatment provided in Section 126. *Hellmich* v. *Hellman*, 276 U.S. 233.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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AUGUST 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957—454551/P.O. 162